CHAN TUCK SENG

v.

CHAN LEE & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: S2-22-620-98]
6 FEBRUARY 2004

CIVIL PROCEDURE: *Res judicata - Estoppel - Application by plaintiff under O. 14A Rules of the High Court 1980 for an order of vacant possession of land - Whether an abuse of process for defendants to raise issues which had been adjudicated upon in previous proceedings - Whether contentious issues raised by defendants in present case rendered nugatory by virtue of decision in previous proceedings*

The plaintiff's father, the sole proprietor of the disputed land in this case ('the said land'), and the first defendant were business partners. The plaintiff's father permitted the partnership factory to be built on the said land and the defendants occupied the said land in order for the business to function effectively. However, as a result of a falling out between the plaintiff's father and the first defendant, the plaintiff's father withdrew from the business and instructed the defendants to vacate the said land. The defendants did not do so. Sometime later, in the course of attempting to sell off the said land, the plaintiff's father discovered that the first defendant had lodged a caveat over the said land. The plaintiff's father applied to set aside the caveat and in Suit No. S3-24-83-1996, James Foong J set aside the caveat after finding that the first defendant did not have any interest, caveatable or otherwise, in the land at all. The plaintiff sought a final disposal of the present suit by way of an application under O. 14A of the Rules of the High Court 1980, praying for an order that the defendants vacate the said land and surrender the same to the plaintiff as the legal and beneficial owner of the said land.

Held:

[1] The principle of *res judicata* governed the present application. This was a case where all the issues which had been, or could have been, raised before James Foong J in Suit No. S3-24-83-1996 were raised again. Essentially, the defences of the defendants and their counterclaims thereto together with the points raised by the first defendant in his affidavit in reply had been examined thoroughly and adjudicated upon in full by James Foong J in the previous proceedings. The judgment of James Foong J was indeed a

final judgment as it was not appealed against in any form or fashion by the defendants. Quite uncontrovertibly, the decision of James Foong J rendered the so-called points of contention raised by the defendants in the present case as nugatory. The defence and counterclaim filed was nothing more than a blatant abuse of the judicial process; it was a mischievous attempt to re-agitate a cause of action that had been adjudicated and decided upon to its finality. (pp 13 d-f, 15 e & 16 f)

[Application allowed.]

Case(s) referred to:

Affleck v. Affleck [1857] 3 Sm & G 394 ***(refd)***
Asher v. Secretary of State for the Environment [1974] Ch 208 ***(refd)***
Baldwyn v. Smith [1900] 1 Ch 588 ***(refd)***
Birkin v. Wing [1890] 63 LT 80 ***(refd)***
Blackbeard v. Lindigren [1786] 1 Cox Eq Cas 205 ***(refd)***
Carl Zeiss Stiftung v. Herbert Smith & Co [1969] 1 Ch 93 ***(refd)***
Cropper v. Smith [1884] 26 Ch D 700 ***(refd)***
Daito Kogyo (Sarawak) Sdn Bhd v. Port Dickson Land Development Sdn Bhd [2001] 8 CLJ 131 HC ***(refd)***
Drew v. Nunn [1879] 4 QBD 661 ***(refd)***
Duchess of Kingston's case [1776] 20 State Tr 355 ***(refd)***
Emma Silver Co v. Grant [1878] 11 Ch D 918 ***(refd)***
Frere v. Peacocke [1846] 1 Rob Eccl 442 ***(refd)***
Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case [2001] 5 CLJ 73 HC ***(refd)***
Gavin Gibson & Co v. Gibson [1913] 82 LJKB 1315 ***(refd)***
Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***
Hall v. Warren [1804] 9 Ves 605 ***(refd)***
Hanks v. Coombes [1927] 44 RPC 305 ***(refd)***
Henderson v. Henderson [1843] 3 Hare 100 ***(refd)***
Hj Yahya Yusoff & Anor v. Hassan Othman & Anor [1978] 2 MLJ 153 ***(refd)***
Hunter v. Chief Constable of the West Midlands Police & Ors [1982] AC 529 ***(refd)***
Inter-Continental Mining Co Sdn Bhd v. Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145 ***(refd)***
Jenkins v. Morris [1880] 14 Ch D 674 ***(refd)***
Jit Kaur v. Parl Singh [1974] 2 MLJ 199 ***(refd)***
K Sockalingam Mudaliar v. MRM Ramasamy Chettiar [1938] 7 MLJ (FMSR) 237 ***(refd)***
Lim Eng Kay v. Jaafar Mohamed Said [1982] CLJ 298; [1982] CLJ (Rep) 190 FC ***(refd)***
Macon Engineers Sdn Bhd v. Goh Hooi Yin [1976] 2 MLJ 53 ***(refd)***
Mahendar Sucha Singh & Anor v. Emile Joseph [2000] 6 CLJ 257 HC ***(refd)***
Margaret Chua v. Ho Swee Kiew & Ors [1961] 27 MLJ 173 ***(refd)***
McIlkenny v. Chief Constable of West Midlands Police Force [1980] 2 All ER 227 ***(refd)***

Mercantile Investment & General Trust Co v. River Plate Trust [1894] 1 Ch 578 ***(refd)***
N Vangedaselam v. Mahadevan & Anor [1976] 2 MLJ 161 ***(refd)***
Ong Chat Pang & Anor v. Valliappa Chettiar [1971] 1 MLJ 224 ***(refd)***
Philips v. Bury [1696] 1 Ld Raym 5, 2 Term Rep 346 ***(refd)***
R v. Hutchings [1881] 6 QBD 300 ***(refd)***
Re Rhodes, Rhodes v. Rhodes [1890] 44 Ch D 94 ***(refd)***
Simson and Mason v. New Brunswick Trading Co [1888] 5 TLR 148 ***(refd)***
Sing Lian Express Sdn Bhd v. Soh Kim Tee [1974] 2 MLJ 24 ***(refd)***
T Damodaran v. Choe Kuan Him [1979] 2 MLJ 267 ***(refd)***
Tan Ah Tong v. Perwira Affin Bank Bhd & Ors [2001] 7 CLJ 500 HC ***(refd)***
Tee Chin Yong v. Ernest Jeff [1963] MLJ 118 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 40, 41, 42, 43, 44
National Land Code 1965, ss. 92, 322(2), 323, 324(1)(a), 340
Rules of the High Court 1980, O. 14A

Other source(s) referred to:
Spencer Bower & Turner, *Res Judicata*, 2nd edn, p 9

For the plaintiff - Wong Kah Hui; M/s Skrine & Co
For the 1st, 2nd, 3rd, 5th, 6th & 7th defendants - Neo Lok Tian; M/s Cheong Yee & Partners

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

This civil case was consolidated on the directive of the late YAA Tan Sri Wan Adnan bin Ismail, the then Chief Judge of Malaya by letter dated 23 November 1999 (encl. 13) with a commercial case bearing number D4-22-74-1996 and it was between Chan Yow Kat @ Chan You as the plaintiff with Chan Lee @ Chan Kong Chai as the defendant (hereinafter referred to as the "D4 case"). In this judgment, I was not concerned with the D4 case. This judgment centred on this civil case only – referring to civil case number S2-22-620-98.

Now, the plaintiff in this civil case filed an application under O. 14A of the Rules of the High Court 1980 ("RHC") as seen in encl. 19. Order 14A of the RHC states as follows:

ORDER 14A
DISPOSAL OF CASE ON POINT OF LAW

1 Determination of questions of law or construction (O. 14A r. 1)

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under Order 18, rule 19, or any other provision of these rules.

2 Manner in which applications under rule 1 may be made (O. 14A r. 2)

An application under rule 1 may be made by summons or motion or (notwithstanding Order 32, rule 1) may be made orally in the course of any interlocutory application to the Court.

It certainly gives leverage to the court to finally determine the entire cause or matter without the need for a full trial. By identifying the question of law or construction of any document, the parties are eliminating or reducing delay and expense in the preparation of the case. It must be borne in mind that a point of law which if decided conclusively would put an end to the litigation, once and for all. It has the beneficial effect of expediting the disposal of the case thereby eliminating the need for the discovery of documents. In *Emma Silver Mining Co. v. Grant* [1878] 11 Ch. D 918, CA, an order was made by the court upon terms for the trial of two issues against two out of several defendants. In the case of *Simson and Mason v. New Brunswick Trading Co.* [1888] 5 TLR 148, the court made an order for the trial of the issue of the rescission of a contract to take shares to be heard first before the issue of damages for fraud was heard. In *Gavin Gibson & Co. v. Gibson* [1913] 82 LJKB 1315, an order was made that the jurisdiction of the foreign court whose judgment was sued upon to be tried earlier in point of time than the claim of the original debt. The court in *Hanks v. Coombes* [1927] 44 RPC 305 ordered that the issue of the validity of a patent to be tried first before the other issues in the action were heard. In *Carl Zeiss Stiftung v. Herbert Smith & Co.* [1969] 1 Ch. 93, [1968] 3 WLR 281, CA, the court ordered to be tried as a preliminary issue the liability of solicitors to account for money received by them in good faith in their capacity as solicitors before the other issues in the action were heard. All these cases showed the willingness of the judges to hear,

on separate basis, the preliminary issues or questions of law. Here, in encl. 19, I was asked to decide under O. 14A of the RHC that would ultimately put an end to litigation. I was more than willing to do so.

The Relevant Affidavits And The Documents Thereto

Enclosure 19 was supported by an affidavit affirmed by Chan Tuck Seng on 13 December 2002 and that affidavit was marked as encl. 20. Annexed to the affidavit in encl. 20 was a certified true copy of the document of qualified title (Form 11B) for premises known as AL299 Sungai Buloh New Village, 47000 Selangor Darul Ehsan and held under Q.T. (M) 779, Mukim of Sungai Buloh, Selangor and that document was marked as exh. "A1". Again annexed to encl. 20 as exh. "A2" was a copy of the judgment of James Foong J dated 24 June 1996 and this very judgment featured prominently in this case.

The affidavit in reply affirmed by Chan Lee @ Chan Kong Chai on 19 March 2003 can be seen in encl. 22 and no exhibits were tendered in that affidavit in reply by the deponent.

Chan Tuck Seng affirmed an affidavit in reply to that of encl. 22 and that affidavit in reply was affirmed on 31 March 2003 and it was marked as encl. 21. Annexed to encl. 21 was a copy of the printout of a document known as the "Catatan Carian Persendirian" dated 26 March 2003 from the Selangor Land Office for premises known as AL 299 Sungai Buloh New Village, 47000 Selangor Darul Ehsan and held under Q.T. (M) 779, Mukim of Sungai Buloh, Selangor and that document was marked as exh. "A3".

Chan Tuck Seng also affirmed a supplemental affidavit that was affirmed on 22 May 2003 and marked as encl. 23 and there he annexed a copy of the letter dated 19 August 1998 from Messrs Skrine & Co together with the respective certificates of posting and these were marked cumulatively as exh. "A4".

Enclosure 19

It was framed and phrased in this fashion and it brought into sharp focus the judgment of James Foong J:

> Bahawa Yang Arif, Dato' James Foong Cheng Yuen, telah memberi Penghakiman muktamad dalam Saman Pemula No. S3-24-83-1996 pada 24.6.1996, yang di dalamnya Yang Arif memutuskan bahawa Defendan Pertama tidak mempunyai apa-apa kepentingan ke atas tanah yang dipegang di bawah Q.T. (M) 779, L.O. 2185 Mukim Sungai Buloh, Selangor Darul Ehsan ("Tanah tersebut") mahupun apa-apa kepentingan yang boleh kaveat dan bahawa Plaintif adalah tuan punya sah dan benefisial Tanah tersebut. Bahawa keputusan Yang Arif tersebut tidak dibuat rayuan menentang oleh

Defendan. Oleh sebab yang demikian, Defendan-Defendan di sini diestop dan dikecuali oleh doktrin *res judicata* dan/atau isu estopel untuk menyatakan bahawa beliau/mereka mempunyai sebarang kepentingan atau hak ke atas Tanah tersebut.

The Facts Of The Case And The Law Thereto

The plaintiff was described as the legal owner of a piece of land for premises known as AL 299 Sungai Buloh New Village, 47000 Selangor Darul Ehsan and held under Q.T. (M) 779, Mukim of Sungai Buloh, Selangor (hereinafter referred to as the "said land").

The dispute pertaining to the said land prompted the plaintiff to file the writ and the statement of claim dated 29 September 1998 as seen in enclosure one (1). The first, second, third, fifth, sixth and seventh defendants filed their defence and counterclaim dated 14 May 1999 as seen in encl. 5. The plaintiff then filed his reply and defence to counterclaim dated 23 August 1999 as reflected in encl. 8.

Both Mr. Wong Kah Hui who acted for the plaintiff and Mr. Neo Lok Tian who acted for the first, second, third, fifth, sixth and seventh defendants were able to enlighten me from the bar pertaining to this case. According to Mr. Neo Lok Tian the fourth defendant by the name of Chan Tuck Fai is of unsound mind and he is the son of the first defendant (Chan Lee @ Chan Kong Chai) and it is for that reason that the fourth defendant was unrepresented. In retort, Mr. Wong Kah Hui submitted that if the fourth defendant is of unsound mind he is presumably under the guardianship or care of the first and the second defendants because they are his parents. The first defendant is the father of the fourth defendant while the second defendant by the name of Wam Muy @ Wong Nooi is the mother of the fourth defendant. Mr. Neo Lok Tian was quite magnanimous when he undertook to relate the outcome of encl. 19 to the fourth defendant through his parents, namely the first and the second defendants.

To date, I am told that the fourth defendant has yet to file his defence and counterclaim to the action. Perhaps this is due to his unsound state of mind. Of course there is no evidence in the form of an affidavit in regard to the mental status of the fourth defendant. But I can surely hearken to the submissions of counsel from the bar as to the mental state of mind of the fourth defendant. The learned counsel from both sides are officers of this court and they have a duty to this court to tell the truth. If it is really true that the fourth defendant is of unsound mind, he certainly cannot give a retainer to any counsel in town. It is said that there must always be a free and full consent to bind a person in contract. Consent may be defined as an act of reason and of volition or choice. A contract of a mentally disordered person may be

invalidated. A mentally disordered person has no capacity to understand the nature of the contract (*Jenkins v. Morris* [1880] 14 Ch D 674 at 681, CA). Cotton LJ in the case of *Re Rhodes, Rhodes v. Rhodes* [1890] 44 Ch D 94 at 105, emphasised that there cannot be a contract made by a lunatic. In *Birkin v. Wing* [1890] 63 LT 80, the test that was applied was whether there was an understanding of the business in question. However, mere weakness of mind may not be sufficient to vitiate a contract (*Drew v. Nunn* [1879] 4 QBD 661 at 669, 670, CA). Again, mere eccentricity would not suffice to vitiate a contract (*Frere v. Peacocke* [1846] 1 Rob Eccl 442; and *Wellesley v. Vere* [1841] 2 Curt 917). The law is quite clear. It is this. That a valid and binding contract cannot be made by a person suffering from an incapacity of mind so as not to understand the nature of what he is doing. But there may be contracts for necessaries that may be enforced. The court in *Baldwyn v. Smith* [1900] 1 Ch 588 validated a contract by a patient suffering from affliction. But in *Blackbeard v. Lindigren* [1786] 1 Cox Eq Cas 205, the court invalidated the bid at an auction by a person suffering from insanity. In situations where contracts are entered during lucid intervals (*Hall v. Warren* [1804] 9 Ves 605) or before insanity cropped in (*Affleck v. Affleck* [1857] 3 Sm. & G 394) they have been held to be enforceable.

So much for the brief legal discourse. I will now continue with the narration of the facts.

The plaintiff's father by the name of Chan Yow Kat @ Chan You was described as the registered proprietor of the said land. The land title clearly showed that the plaintiff's father was the sole proprietor of the said land.

The plaintiff's father and the first defendant by the name of Chan Lee @ Chan Kong Chai were business partners in a business known as Kwong Chun Sauce Factory since 1961. The plaintiff's father permitted the partnership factory to be built on the said land and paid for the construction of the factory from the income of the partnership. The plaintiff's father allowed the partnership to occupy the said land and the defendants occupied the said land in 1978 in order for the business to continue and function effectively.

Sometime in the year 1995, there was a falling out between the plaintiff's father and the first defendant. As a consequence thereto, the plaintiff's father and the first, second and fifth defendants, on a number of occasions, disrupted the business. The unpleasantness and the strained relationships had prompted the plaintiff's father to withdraw from the business on 1 January 1996. The plaintiff's father also verbally instructed the defendants to vacate the said land. But the defendants were stubborn. They refused to vacate the said land despite being instructed to do so. So in order to prevent the business from going down the hill, the plaintiff's father and the family members were forced to vacate

the said land and set up another factory in order to carry on the business. As a result thereto, the plaintiff's father had incurred considerable expense and inconvenience.

Sometime in 1995, in the course of an attempt to sell off the said land, the plaintiff's father discovered that the first defendant had lodged a caveat over the said land. The grounds stated in the caveat were as follows:

> Saya merupakan salah seorang pembeli kepada harta tersebut di mana nama saya tidak didaftarkan dalam hakmilik harta tersebut pada masa pembelian kerana tanah itu tanah pertanian yang tidak melebehi dua ekar tidak dapat didaftarkan dengan nama lebih dari seorang. Jadi, saya memasukkan kaveat ini untuk menjaga hak kepentingan saya dalam harta tersebut.

The plaintiff's father being aggrieved proceeded to file an application to set aside the caveat and this can be seen in Originating Summons No: S3-24-83-1996. James Foong J heard the matter and his Lordship set aside the caveat. Thereafter the plaintiff's father transferred the said land to the plaintiff on 21 July 1997.

That was in the nature of a private caveat. Under s. 324 (1) (a) of the National Land Code 1965 ("the NLC") a private caveat may be entered against the whole land of the caveatee, or if he is registered as a co-proprietor, against his particular interest in the land. Section 323 of the NLC sets out the categories of persons who may enter private caveats. Briefly put, not every person can enter a private caveat. A person must have a caveatable interest in the land before he is allowed to enter a private caveat. The essential requirements would be this. That a person who enters a private caveat must necessarily claim title to, or any registrable interest in the land or any right to such title or interest. Under s. 324(1) of the NLC, it is not the duty or function of the registrar to enquire into the validity of the claims on which an application for entry is made. According to a long line of authorities, the registrar's duty in regard to an application for entry of a private caveat is purely administrative or ministerial (*N. Vangedaselam v. Mahadevan & Anor.* [1976] 2 MLJ 161; *Tee Chin Yong v. Ernest Jeff* [1963] MLJ 118, 119; *Ong Chat Pang & Anor. v. Valliappa Chettiar* [1971] 1 MLJ 224 at 230; and *T. Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267, 270). Of course, the application must be made in the proper form duly signed, attested, verified by the statutory declaration of the applicant in question or by his advocate and solicitor and accompanied by the appropriate fee. Once all these have been fulfilled the registrar must accordingly enter the private caveat applied for by the applicant. The courts have been very magnanimous. They have held that the following persons to have caveatable interests in land:

(1) a purchaser who can show a valid and enforceable agreement (*Macon Engineers Sdn. Bhd. v. Goh Hooi Yin* [1976] 2 MLJ 53, FC);

(2) a person who holds an option or in plain language an option holder as envisaged in the case of *Sing Lian Express Sdn. Bhd. v. Soh Kim Tee* [1974] 2 MLJ 24;

(3) a personality known as the chargee (*K. Sockalingam Mudaliar v. (1) M.R.M. Ramasamy Chettiar, (2) A. Veeramal* [1938] 7 MLJ (FMSR) 237);

(4) a personality known as the lessee (*Margaret Chua v. Ho Swee Kiew & Ors.* [1961] 27 MLJ 173);

(5) a personality known as the sub-lessee (*Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145);

(6) the beneficiary challenging the validity of a transfer of a piece of land after the beneficiary has obtained the letters of administration (*Jit Kaur v. Parl Singh* [1974] 2 MLJ 199); and

(7) the beneficiary of a wakaf land (*Haji Yahya bin Yusoff & Anor. v. Hassan bin Othman & Anor* [1978] 2 MLJ 153).

The existence of a private caveat is prohibitive. It prohibits any dealing in the land or interest that is bound by the private caveat. Now, under s. 322(2) of the NLC the existence of a private caveat would prohibit registration, endorsement or entry of:

(i) any instrument of dealing that has been executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;

(ii) any claim that arises from the benefit of any tenancy exempt from registration granted by the proprietor of the land; and

(iii) any lien-holder's caveat that is in existence.

I will now revert back to the narration of the facts.

The plaintiff averred that he was advised by his solicitors Messrs. Skrine & Co to say that he verily believed that he has an indefeasible title to the said land under s. 92 of the NLC and he too verily believed that this was confirmed by James Foong J, in his Lordship's judgment in suit number S3-24-83-1996. Now, in his judgment James Foong J decided that there was neither fraud nor representation exerted by the plaintiff's father and that the title was not affected by s. 340 of the NLC. It was because of the judgment of James Foong J that the plaintiff was prompted to seek a declaration that he is the sole legal owner

of the said land. His Lordship held that the first defendant did not raise a serious question to be tried. In essence, his Lordship held that the first defendant did not have any interest over the said land nor any caveatable interest.

It was pointed out that on the strength of James Foong J's judgment, the defendants should be regarded as squatters as they failed to obtain the plaintiff's permission to continue occupying the said land. In the circumstances, the plaintiff specifically requested that the defendants ceased occupation of the said land. It was the stand of the plaintiff that the defendants have no *locus standi* to defend the present case on matters that have already been decided and adjudicated upon by James Foong J. The plaintiff prayed for an order that the defendants be ordered to vacate the said land and surrender the same to the plaintiff as the legal and beneficial owner of the said land. The plaintiff was further advised to say and he verily believed that since the decision of James Foong J was not appealed against and based on the principle of *res judicata* this court should not entertain the defence raised by the defendants as they were dealt with and disposed of in suit number S3-24-83-1996 before James Foong J. The plaintiff was also advised to say the following salient facts:

(a) that the present action before me had been deliberated upon and arose out of an action that was competently disposed off by a court of competent jurisdiction presided by my brother judge Justice James Foong and that his Lordship had delivered a final judgment;

(b) that the present action arose between the same parties or privies and these parties to the proceedings are now litigating the matter once again;

(c) the issues in these proceedings are the same as that which had been litigated by James Foong J; and

(d) that the issue of estoppel relied upon by the plaintiff had been expressly pleaded in para. 19 of the reply and defence to counterclaim.

For all these reasons, the plaintiff sought for an order in terms of encl. 19.

To The Heart Of The Matter

The plaintiff sought a final disposal of the present suit by way of an application under O. 14A of the RHC. The plaintiff asked that the suit be determined per *estoppel per rem judicatem* and that it was essentially to prevent an abuse of judicial process by the defendants since the issue of the plaintiff's ownership of the said land had been decided by James Foong J on 24 June 1996 in Kuala Lumpur High Court Originating Summons number S3-24-83-1996. I must, at the outset, say that the principle of *estoppel per rem judicatem* in its wider sense as stated and laid down in *Henderson v. Henderson* [1843] 3 Hare 100, and followed dutifully in *Greenhalgh v. Mallard* [1947] 2 All ER 255, and

applied vigorously in *Asher v. Secretary of State for the Environment* [1974] Ch 208 would be applicable in adjudicating encl. 19. Wigram VC in *Henderson v. Henderson (supra)* at p. 115, had this to say of *res judicata*:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Somervell LJ in *Greenhalgh v. Mallard (supra)* at p. 257 observed that:

> … res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but … it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

It must be emphasised that the doctrine of *res judicata* flows from the doctrine that there must be an end to litigation.

Now, four points were raised by the defendants and they may be summarised as follows:

(1) that the plaintiff's right to ownership of the said land was disputed and that the beneficial interest in the said land was defeasible;

(2) that the first defendant has an equal beneficial interest in the said land;

(3) that in consequence thereto the transfer of the said land from the plaintiff's father to the plaintiff was tainted with fraud since the said land should originally have been registered in the name of the partnership; and

(4) that the raison d'etre of the decision of his Lordship Justice James Foong dated 24 June 1996 was not applicable and therefore the principle of *res judicata* or issue estoppel was not binding.

In my judgment, these four points relate to the same issue. It was this. It revolved on the plaintiff's ownership of the said land and that would be the crux of the defendant's dispute against the plaintiff's claim. The focal point of attention was the said land.

The first defendant averred that he together with the plaintiff's father had purchased the said land. The first defendant claimed to have contributed the sum of RM11,500 being 50% of the purchase price towards the total purchase price of the said land but somehow his name had not been registered as the registered proprietor because the first defendant contended as set out in his caveat that land of less than two (2) acres could not be registered in the name of more than one individual. It was because of that, so say the first defendant, that the said land had only been registered in the name of the plaintiff's father. With respect, the first defendant's contention cannot hold water. It was doomed to fail. It must be borne in mind that in the Kuala Lumpur High Court Originating Summons number S3-24-83-1996, his Lordship James Foong J in his judgment dated 24 June 1996 had decided that the caveat lodged by the first defendant to assert his beneficial interest in the said land must be set aside. This was what his Lordship had held:

> It is pertinent to at the outset to point out that the said land was registered in the name of the Applicant (the plaintiff's father) as the sole proprietor in 1974. At the material time there was no provisions in the National Land Code or any other law which restrict registration of more than one person as the registered proprietor on agricultural land which is not over two acres.
>
> Thus the reasons expressed by the Respondent (the first defendant in this suit) in Form 19B of the National Land Code for the lodgment of this caveat has no basis.

His Lordship then proceeded to say in regard to the alleged sum paid by the first defendant towards the purchase of the said land:

> The Respondent (the first defendant in this suit) in his affidavits alleged that he paid out RM11,500.00 being half the amount of the purchase price for the said land. However, this is completely contradictory to the documentary evidence adduced by the Applicant (the plaintiff's father). In Form 14A NLC which evidence the transfer of this land to the Applicant (the plaintiff's father), the consideration stated is only RM5,000.00 for the entire land.

In regard to the issues of fraud and the purported existence of a trust, his Lordship James Foong J had this to say:

> The Respondent (the first defendant in this suit) then alleged fraud on the part of the Applicant (the plaintiff's father) for registering the said land only in his name when the said land should belong to a partnership. It is the opinion of this court that though a factory belong to a partnership where the Applicant (the plaintiff's father) and the Respondent (the first defendant) are partners is built on the said land, in law this does not amount to that the partnership also owns the land; the partnership only owns the factory. Similarly payment of assessment and quit rent from the partnership does not give rise to such a claim that the said land is a trust property for the said partnership – see *Tay Guan Ho v. Chin Huat Hin & Co* [1987] 2 MLJ 704.

> The said land has been registered in the name of the applicant (the plaintiff's father) as a sole proprietor almost 22 years ago, and the respondent (the first defendant in this suit) is not without knowledge of this. If the applicant (the plaintiff's father) was holding this said land for and on behalf of the partnership there should be some evidence to indicate the existence of a trust but, this is absent in this case.

So, it can be surmised that James Foong J had found that the first defendant had no beneficial interest in the said land or at all. The sole proprietor to the said land had, at all times, been the plaintiff's father and this proprietorship had been validly transferred and registered in the name of the plaintiff on 21 July 1997. This transfer in proprietorship is explicitly documented in exh. "A3" of encl. 21 (the affidavit in reply of the plaintiff) which carried the legend "Catatan Carian Persendirian" dated 26 March 2003 from the Selangor Land Office for the said land.

This was a case where all the issues had been raised before James Foong J in the Kuala Lumpur High Court Originating Summons number S3-24-83-1996 and now raised once again before me in this case. This was also a case where all the issues had been raised as opposed to could have been raised in the earlier proceedings. It would be "monstrous" to allow the defendants a second bite at the cherry, so to speak. Essentially the defences of the first, second, third, fifth, sixth and seventh defendants and their counterclaims thereto together with the points raised by the first defendant in his affidavit in reply as seen in enclosure 22 had been examined thoroughly and adjudicated upon in full by James Foong J in the previous proceedings which had been alluded to earlier. The passages from the judgment of James Foong J have been reproduced in extenso somewhere in this judgment. Of pertinence would be this. That the judgment of James Foong J was not appealed against in any form or fashion by the defendants particularly the first defendant or at all. That was indeed a final judgment.

This was not the case where the issues or facts which were so closely and clearly part and parcel of the litigation had not been raised or could have been raised but not raised. Rather all those issues or facts were raised before James Foong J in the earlier proceedings and now raised, once again, before me. It would clearly be an abuse of the process of the court to allow such manoeuvrings (see the speech of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police & Ors* [1982] AC 529, 542).

In *Tan Ah Tong v. Perwira Affin Bank Bhd & Ors* [2001] 7 CLJ 500, I had occasion to say that:

> At common law, the concept of *'functus officio'* and the concept of 'estoppel by judicial record' are inter related to one another and these two concepts are usually advanced as procedural objections and they are often used interchangeably to mean, usually, the same thing and the court will often arrive at the same conclusion.

I must proceed further and I have this to say.

Estoppel by record is governed by ss. 40 to 44 of the Evidence Act 1950. I am particularly taken by the speech of Lord Holt CJ in the case of *Philips v. Bury* [1696] 1 Ld Raym 5, 2 Term Rep 346 at 357 where his Lordship said:

> The law hath respect, not only to courts of record and judicial proceedings there, but even to all other proceedings where the person who gives judgment or sentence hath judicial authority.

My brother judge, James Foong J, is certainly a Judge with competent jurisdiction and his judgment in the earlier proceedings sealed the fate of the defendants in the present proceedings. Spencer Bower and Turner on *"Res Judicata"* 2nd edn at p. 9 carries the following pertinent passage:

> Where a final judicial decision has been pronounced by a judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation as against any other party or privy thereto, and, in the case of a decision in rem, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the foundation of an action, or relied upon as a bar to any claim, indictment or complaint, or to any affirmative defence, case or allegation, if, but not unless, the party interested raises the point of estoppel at the proper time and in the proper manner.

Here the plaintiff, as alluded to earlier, had expressly pleaded in para. 19 of the reply and defence to counterclaim the issue of estoppel at the proper time and in the proper manner. Everything was done above board.

The French have a way with words. In fact, the word "estoppel" hails from the French word for a "bunk" or "cork". In French style it is spoken as "estoupail" which means "stopped". Here, it would be ideal to refer to Coke *Commentaries on Littleton 352* and the speech of that brilliant judge in the person of Lord Denning in *McIlkenny v. Chief Constable of West Midlands Police Force* [1980] 2 All ER 227 at 235. The judgment of a court would give rise to an estoppel by record (*Cropper v. Smith* [1884] 26 Ch D 700, CA). Two significant principles must be put to the forefront. The first is this. That it is in the public interest that there shall be finality to litigation. The Latin term would be this: interest *rei publicae ut sit finis litium*. The second would be this old principle that no one should be harassed twice for the same

cause. In Latin, it sounds like this: *nemo debet bis vexari pro eadem causa*. According to the case of *R v. Hutchings* [1881] 6 QBD 300, CA, a judgment of a court which acted within its jurisdiction is conclusive in law. The conclusiveness is seen when it estopps a party to litigation from giving evidence to contradict it. However, the conclusive effect of a judgment may be avoided by showing that the judgment was obtained by fraud or collusion (*Duchess of Kingston*'s Case [1776] 20 State Tr 355). Here, fraud or collusion was not proved at all. The impeccable judgment of James Foong J had considered all the pertinent issues. This was my judgment and I so hold accordingly.

It is germane to mention that the doctrine of *estoppel per rem judicatem* is sometimes referred to as estoppel by record *inter partes*. A judgment is said to be conclusive as to the facts on which it was based as against the parties to the legal proceedings in which the judgment was given and their privies. The word "privies" would refer to those persons who derive title from an original party or who share with such a party a common interest in the subject matter of the litigation in question. On this point it is ideal to read the case of *Mercantile Investment & General Trust Co v. River Plate Trust* [1894] 1 Ch 578. The literature on estoppel by record may go on *ad infinitum*.

Quite uncontrovertibly, the decision of James Foong J has rendered the so called points of contention as raised by the defendants as nugatory. The defence and counterclaim filed may be labelled as nothing more than a blatant abuse of the judicial process. It was a mischievous attempt to re-agitate a cause of action that had already been adjudicated and decided upon to its finality.

In regard to the allegation that the defendants have not been told to vacate the said land, I have this to say. The plaintiff had through his solicitors Messrs Skrine & Co demanded by letters – all seven of them bearing the same date of 19 August 1998 as seen in exhibit marked collectively as exh. "A4" to the supplemental affidavit of the plaintiff that was affirmed on 22 May 2003 as seen in encl. 23, that the defendants cease occupying and vacate the said land as the defendants were clearly in unlawful occupation and possession of the said land. The defendants' denial that they knew that the plaintiff wanted them to vacate the said land when they had no right to be in possession or occupation of the same was made all the more preposterous by the fact that the plaintiff has continuously maintained the same position in this suit which was filed way back on 30 August 1998 and the same had been served on all the defendants. Incidentally, the filing of this suit served as a notice to all the defendants of the plaintiff's demand that they vacate the said land.

In desperation, the defendants asserted that the parties in this suit are not the same as the parties that appeared before James Foong J. To this, I have this to say. The case before James Foong J involved a dispute between the plaintiff's father and the first defendant wherein the first defendant's caveat was removed

by the learned judge who had found him – referring to the first defendant, not to have any beneficial interest in the said land or at all. In the present case before me, the plaintiff to whom the said land had been transferred to on 21 July 1997 sought redress, *inter alia*, that vacant possession of the said land of which the plaintiff is now the registered proprietor be granted to him. It was certainly ludicrous on the part of the first defendant to resist the plaintiff's claim bearing in mind the decision of James Foong J who has held that the first defendant had no beneficial interest in the said land. Plainly, in the words of James Foong J, the first defendant had no beneficial interest to the said land at all. But the first defendant has stubbornly maintained in his counterclaim half of the said land knowing fully well that such a claim has already been dismissed by James Foong J. It would be pertinent to point out that the second, third, fifth, sixth and the seventh defendants in their defence and counterclaim did not assert any interests in the said land or at all. These defendants together with the fourth defendant, at best, merely resided there despite the repeated demands of the plaintiff to vacate the said land. In law, all the defendants must be held to be mere squatters.

In regard to the delay in filing the O. 14A application, my response would be simply this. The plaintiff was entitled to file encl. 19 "at any stage of the proceedings". In my judgment, there was no question of delay. In encl. 19, the plaintiff was merely expressing his desire to expedite the determination of this suit bearing in mind that he is the registered proprietor of the said land. There must certainly be finality to this suit. The plaintiff should not be vexed twice in the same cause.

On *res judicata*, I have in detail alluded to this doctrine in *Mahendar Sucha Singh & Anor v. Emile Joseph* [2000] 6 CLJ 257 and in *Daito Kogyo (Sarawak) Sdn Bhd v. Port Dickson Land Development Sdn Bhd* [2001] 8 CLJ 131 and I have nothing more to add save that encl. 19 must be governed by the principle of *res judicata*.

Conclusion

For the reasons as adumbrated above, I allowed encl. 19 with costs. This meant that I allowed the prayers in paras. 20(a), 20(b), 20(c), 20(d), and 20(e) of the statement of claim as per enclosure one (1) with costs. It would be ideal and rather appropriate for me to reproduce in verbatim para. 20 of the statement of claim in enclosure one (1) and I shall do so now:

> 20. By reason of the matters aforesaid the Plaintiff has been deprived of the use and enjoyment of the premises and has thereby suffered loss and damage.

And the Plaintiff claims:

(a) an Order for vacant possession of the premises within seven (7) days of the date of the Order;

(b) a Declaration that the defendants are not entitled to enter the premises (referring to the said land);

(c) an injunction to restrain the Defendants whether by himself/herself or by his/her servants or agents or otherwise howsoever from entering the premises (referring to the said land);

(d) damages; (and)

(e) costs.

In addition to that, I forthwith struck out the counterclaim of the first, second, third, fifth, sixth and seventh defendants.

I too ordered that the file be closed and this order fell under para. 20(f) of the statement of claim which reads as follows:

(f) such further or other relief which this Honourable Court deems fit.

According to Salleh Abas FJ in the case of *Lim Eng Kay v. Jaafar bin Mohamed Said* [1982] CLJ 298; [1982] CLJ (Rep) 190 such prayer should not be "treated as a mere ornament … devoid of any meaning". Accordingly, I must give life to that prayer (*Fulcrum Capital Sdn Bhd v. Dato' Samsudin Abu Hassan; Rahaz Sdn Bhd & Anor (Interveners) & Another Case* [2001] 5 CLJ 73, 115).